Not Intended for Print Publication

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EDWARD N. BELL,	)	
	)	
Petitioner,	)	Case No. 7:04CV00752
	)	
v.	)	**OPINION AND ORDER**
	)	
LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON,	)	By: James P. Jones
	)	Chief United States District Judge
	)	
Respondent.	)	

James G. Connell, III, and Randi R. Vickers, Devine & Connell, P.L.C., Fairfax, Virginia, and Matthew K. Roskoski, Katharine R. Saunders, Brian L. Stekloff, and Kendall C. Burman, Latham & Watkins, L.L.P., Washington, D.C., for Petitioner; Katherine P. Baldwin, Senior Assistant Attorney General of Virginia, Richmond, Virginia, for Respondent.

After considering Edward N. Bell's federal petition for writ of habeas corpus, I granted him an evidentiary hearing on his claim that he received ineffective assistance of counsel due to his trial attorneys' failure to present available evidence in mitigation at the sentencing phase of his trial. *See Bell v. True*, 413 F. Supp. 2d 657, 738 (W.D. Va. 2006). In anticipation of this upcoming hearing, the petitioner filed the present Motion for Leave to Serve Discovery. Specifically, Bell requests (1) leave to take depositions of Bell's trial attorneys, (2) an order directing the state to

produce all documents and statements relating to evidence in aggravation, and (3) an order directing the state to produce the original open file that the prosecutor made available to Bell's trial counsel. Because I find that the petitioner has failed to establish the requisite good cause to take discovery under Rule 6(a) of the Rules Governing § 2254 Cases, I will deny the petitioner's motion.

Unlike a typical civil litigant, a habeas petitioner is not entitled to discovery as a matter of ordinary course. *See Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rule 6(a) provides that:

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

A federal habeas petitioner establishes the requisite good cause to take discovery "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy*, 520 U.S. at 908-09. The petitioner has failed to meet this standard here.

First, Bell has not demonstrated good cause to permit the depositions of Jud Fischel and Mark Williams, Bell's two defense attorneys, because the record clearly demonstrates that these two individuals have been consistently accessible to Bell's

habeas counsel. Indeed, Bell's former attorneys provided affidavits in support of Bell's claims. Given this previous availability and the fact that Williams and Fischel will both be present for additional questioning at the upcoming evidentiary hearing, I do not find good cause to depose them, especially at this late date.

Bell has similarly failed to establish the requisite good cause to warrant discovery of "all documents and statements possessed by the Commonwealth relating to evidence in aggravation used at Bell's trial" and the entire "open file" that the Commonwealth made available to Bell's trial counsel. In his habeas petition, Bell listed the evidence that he argues his trial counsel should have uncovered and presented during the sentencing phase of his trial, and the scope of the upcoming evidentiary hearing is limited to this claim. The broad discovery requests now before the court constitute an impermissible "fishing expedition" into speculative additional deficiencies of Bell's trial counsel and must be denied. *See, e.g., Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004) ("Rule 6 does not 'sanction fishing expeditions based on a petitioner's conclusory allegations.'") (citing *Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir. 1997)); *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994) ("Rule 6, which permits the district court to order discovery on good cause shown, does not authorize fishing expeditions.")

For the foregoing reasons, and for the reasons expressed by the state in its opposition to this motion, I find that the petitioner has not demonstrated good cause to warrant the requested discovery. Accordingly, it is **ORDERED** that Petitioner's Motion for Leave to Serve Discovery is DENIED.

ENTER: June 7, 2006

/s/ JAMES P. JONES
Chief United States District Judge